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July 14, 2016

BY ELECTRONIC FILING

Catherine O'Hagan Wolfe

Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007
(212) 857-8500

Re: Grocery Manufacturers Association v. Sorrell, No. 15-1504-cv

**Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j),
Senate Bill 764, 114th Cong. (2016)**

Dear Ms. Wolfe:

Appellants offer notice that the U.S. Senate and House of Representatives have passed S. 764, a bill that provides for a national mandatory disclosure standard for bioengineered foods and preempts state genetic-engineering labeling requirements. The President is expected to sign the bill within days. *See Alan Bjerga & Angela Greiling Keane, Obama Ready to Sign Food-Label Bill Consumer Groups Dislike*, Bloomberg (July 13, 2016).

The bill is attached to this letter as Exhibit A.

Among other things, the bill provides that:

- “A food may bear a disclosure that the food is bioengineered only in accordance with regulations promulgated by the Secretary in accordance with this subtitle.” *Id.* § 293(b)(1).

- “No State or a political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food (including food served in a restaurant or similar establishment) or seed is genetically engineered (which shall include such other similar terms as determined by the Secretary of Agriculture) or was developed or produced using genetic engineering, including any requirement for claims that a food or seed is or contains an ingredient that was developed or produced using genetic engineering.” *Id.* § 295(b).

Vermont’s Act 120 requires, among other things, that certain foods “be labeled as produced entirely or in part from genetic engineering,” 9 V.S.A. § 3043(a)—precisely what this bill prohibits. It therefore will be expressly preempted once the federal bill is enacted.

Appellants will of course notify the Court when the President signs the bill, but wished to apprise the Court of this potentially case-dispositive development in the interim. Once the bill is enacted into law, Appellants intend to move for voluntary dismissal of this appeal.

Sincerely,

/s/ Catherine E. Stetson
Catherine E. Stetson

Counsel for Plaintiffs-Appellants

cc: All Counsel of Record (by CM/ECF notice)

EXHIBIT A

In the Senate of the United States,

July 7, 2016.

Resolved, That the Senate agree to the amendment of the House of Representatives to the text of the bill (S. 764) entitled “An Act to reauthorize and amend the National Sea Grant College Program Act, and for other purposes.”, do pass with the following

SENATE AMENDMENT TO HOUSE AMENDMENT:

In lieu of the matter proposed to be inserted, insert the following:

1 **SECTION 1. NATIONAL BIOENGINEERED FOOD DISCLOSURE**

2 **STANDARD.**

3 *The Agricultural Marketing Act of 1946 (7 U.S.C.*

4 *1621 et seq.) is amended by adding at the end the following:*

5 **“Subtitle E—National Bioengineered Food Disclosure Standard”**

8 **“SEC. 291. DEFINITIONS.**

9 *“In this subtitle:*

1 “(1) *BIOENGINEERING.*—The term ‘bio-
2 engineering’, and any similar term, as determined by
3 the Secretary, with respect to a food, refers to a
4 food—

5 “(A) that contains genetic material that has
6 been modified through *in vitro recombinant*
7 deoxyribonucleic acid (DNA) techniques; and

8 “(B) for which the modification could not
9 otherwise be obtained through conventional
10 breeding or found in nature.

11 “(2) *FOOD.*—The term ‘food’ means a food (as
12 defined in section 201 of the Federal Food, Drug, and
13 Cosmetic Act (21 U.S.C. 321)) that is intended for
14 human consumption.

15 “(3) *SECRETARY.*—The term ‘Secretary’ means
16 the Secretary of Agriculture.

17 **“SEC. 292. APPLICABILITY.**

18 “(a) *IN GENERAL.*—This subtitle shall apply to any
19 claim in a disclosure that a food bears that indicates that
20 the food is a bioengineered food.

21 “(b) *APPLICATION OF DEFINITION.*—The definition of
22 the term ‘bioengineering’ under section 291 shall not affect
23 any other definition, program, rule, or regulation of the
24 Federal Government.

1 “(c) *APPLICATION TO FOODS.*—This subtitle shall
2 *apply only to a food subject to—*

3 “(1) *the labeling requirements under the Federal*
4 *Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);*
5 *or*

6 “(2) *the labeling requirements under the Federal*
7 *Meat Inspection Act (21 U.S.C. 601 et seq.), the Poul-*
8 *try Products Inspection Act (21 U.S.C. 451 et seq.),*
9 *or the Egg Products Inspection Act (21 U.S.C. 1031*
10 *et seq.) only if—*

11 “(A) *the most predominant ingredient of the*
12 *food would independently be subject to the label-*
13 *ing requirements under the Federal Food, Drug,*
14 *and Cosmetic Act (21 U.S.C. 301 et seq.); or*

15 “(B)(i) *the most predominant ingredient of*
16 *the food is broth, stock, water, or a similar solu-*
17 *tion; and*

18 “(ii) *the second-most predominant ingre-*
19 *dient of the food would independently be subject*
20 *to the labeling requirements under the Federal*
21 *Food, Drug, and Cosmetic Act (21 U.S.C. 301 et*
22 *seq.).*

1 **“SEC. 293. ESTABLISHMENT OF NATIONAL BIOENGINEERED**

2 ***FOOD DISCLOSURE STANDARD.***

3 “(a) *ESTABLISHMENT OF MANDATORY STANDARD.—*

4 *Not later than 2 years after the date of enactment of this*
5 *subtitle, the Secretary shall—*

6 “(1) *establish a national mandatory bioengi-*
7 *neered food disclosure standard with respect to any*
8 *Bioengineered food and any food that may be bioengi-*
9 *neered; and*

10 “(2) *establish such requirements and procedures*
11 *as the Secretary determines necessary to carry out the*
12 *standard.*

13 “(b) *REGULATIONS.—*

14 “(1) *IN GENERAL.—A food may bear a disclosure*
15 *that the food is bioengineered only in accordance with*
16 *regulations promulgated by the Secretary in accord-*
17 *ance with this subtitle.*

18 “(2) *REQUIREMENTS.—A regulation promul-*
19 *gated by the Secretary in carrying out this subtitle*
20 *shall—*

21 “(A) *prohibit a food derived from an ani-*
22 *mal to be considered a bioengineered food solely*
23 *because the animal consumed feed produced*
24 *from, containing, or consisting of a bioengi-*
25 *neered substance;*

1 “(B) determine the amounts of a bioengi-
2 neered substance that may be present in food, as
3 appropriate, in order for the food to be a bio-
4 engineered food;

5 “(C) establish a process for requesting and
6 granting a determination by the Secretary re-
7 garding other factors and conditions under
8 which a food is considered a bioengineered food;

9 “(D) in accordance with subsection (d), re-
10 quire that the form of a food disclosure under
11 this section be a text, symbol, or electronic or
12 digital link, but excluding Internet website Uni-
13 form Resource Locators not embedded in the link,
14 with the disclosure option to be selected by the
15 food manufacturer;

16 “(E) provide alternative reasonable disclo-
17 sure options for food contained in small or very
18 small packages;

19 “(F) in the case of small food manufactur-
20 ers, provide—

21 “(i) an implementation date that is
22 not earlier than 1 year after the implemen-
23 tation date for regulations promulgated in
24 accordance with this section; and

1 “(ii) on-package disclosure options, in
2 addition to those available under subparagraph (D), to be selected by the small food
3 manufacturer, that consist of—

5 “(I) a telephone number accompanied by appropriate language to indicate that the phone number provides
6 access to additional information; and

7 “(II) an Internet website maintained by the small food manufacturer
8 in a manner consistent with subsection
9 (d), as appropriate; and

10 “(G) exclude—

11 “(i) food served in a restaurant or
12 similar retail food establishment; and

13 “(ii) very small food manufacturers.

14 “(3) SAFETY.—For the purpose of regulations
15 promulgated and food disclosures made pursuant to
16 paragraph (2), a bioengineered food that has successfully completed the pre-market Federal regulatory review process shall not be treated as safer than, or not as safe as, a non-bioengineered counterpart of the food solely because the food is bioengineered or produced or developed with the use of bioengineering.

1 “(c) *STUDY OF ELECTRONIC OR DIGITAL LINK DIS-*
2 *CLOSURE.*—

3 “(1) *IN GENERAL.*—Not later than 1 year after
4 the date of enactment of this subtitle, the Secretary
5 shall conduct a study to identify potential techno-
6 logical challenges that may impact whether consumers
7 would have access to the bioengineering disclosure
8 through electronic or digital disclosure methods.

9 “(2) *PUBLIC COMMENTS.*—In conducting the
10 study under paragraph (1), the Secretary shall solicit
11 and consider comments from the public.

12 “(3) *FACTORS.*—The study conducted under
13 paragraph (1) shall consider whether consumer access
14 to the bioengineering disclosure through electronic or
15 digital disclosure methods under this subtitle would be
16 affected by the following factors:

17 “(A) *The availability of wireless Internet or*
18 *cellular networks.*

19 “(B) *The availability of landline telephones*
20 *in stores.*

21 “(C) *Challenges facing small retailers and*
22 *rural retailers.*

23 “(D) *The efforts that retailers and other en-*
24 *tities have taken to address potential technology*
25 *and infrastructure challenges.*

1 “(E) *The costs and benefits of installing in
2 retail stores electronic or digital link scanners or
3 other evolving technology that provide bio-
4 engineering disclosure information.*

5 “(4) *ADDITIONAL DISCLOSURE OPTIONS.—If the
6 Secretary determines in the study conducted under
7 paragraph (1) that consumers, while shopping, would
8 not have sufficient access to the bioengineering disclo-
9 sure through electronic or digital disclosure methods,
10 the Secretary, after consultation with food retailers
11 and manufacturers, shall provide additional and
12 comparable options to access the bioengineering dis-
13 closure.*

14 “(d) *DISCLOSURE.—In promulgating regulations
15 under this section, the Secretary shall ensure that—*

16 “(1) *on-package language accompanies—*

17 “(A) *the electronic or digital link disclosure,
18 indicating that the electronic or digital link will
19 provide access to an Internet website or other
20 landing page by stating only ‘Scan here for more
21 food information’, or equivalent language that
22 only reflects technological changes; or*

23 “(B) *any telephone number disclosure, indi-
24 cating that the telephone number will provide ac-*

1 cess to additional information by stating only
2 ‘Call for more food information.’;

3 “(2) the electronic or digital link will provide ac-
4 cess to the bioengineering disclosure located, in a con-
5 sistent and conspicuous manner, on the first product
6 information page that appears for the product on a
7 mobile device, Internet website, or other landing page,
8 which shall exclude marketing and promotional infor-
9 mation;

10 “(3)(A) the electronic or digital link disclosure
11 may not collect, analyze, or sell any personally iden-
12 tifiable information about consumers or the devices of
13 consumers; but

14 “(B) if information described in subparagraph
15 (A) must be collected to carry out the purposes of this
16 subtitle, that information shall be deleted immediately
17 and not used for any other purpose;

18 “(4) the electronic or digital link disclosure also
19 includes a telephone number that provides access to
20 the bioengineering disclosure; and

21 “(5) the electronic or digital link disclosure is of
22 sufficient size to be easily and effectively scanned or
23 read by a digital device.

24 “(e) STATE FOOD LABELING STANDARDS.—Notwith-
25 standing section 295, no State or political subdivision of

1 *a State may directly or indirectly establish under any au-*
2 *thority or continue in effect as to any food in interstate*
3 *commerce any requirement relating to the labeling or disclo-*
4 *sure of whether a food is bioengineered or was developed*
5 *or produced using bioengineering for a food that is the sub-*
6 *ject of the national bioengineered food disclosure standard*
7 *under this section that is not identical to the mandatory*
8 *disclosure requirement under that standard.*

9 “(f) *CONSISTENCY WITH CERTAIN LAWS.*—The Sec-
10 *retary shall consider establishing consistency between—*

11 “(1) *the national bioengineered food disclosure*
12 *standard established under this section; and*
13 “(2) *the Organic Foods Production Act of 1990*
14 *(7 U.S.C. 6501 et seq.) and any rules or regulations*
15 *implementing that Act.*

16 “(g) *ENFORCEMENT.*—

17 “(1) *PROHIBITED ACT.*—It shall be a prohibited
18 *act for a person to knowingly fail to make a disclo-*
19 *sure as required under this section.*

20 “(2) *RECORDKEEPING.*—Each person subject to
21 *the mandatory disclosure requirement under this sec-*
22 *tion shall maintain, and make available to the Sec-*
23 *retary, on request, such records as the Secretary deter-*
24 *mines to be customary or reasonable in the food in-*

1 *dustry, by regulation, to establish compliance with*
2 *this section.*

3 “*(3) EXAMINATION AND AUDIT.—*

4 “*(A) IN GENERAL.—The Secretary may*
5 *conduct an examination, audit, or similar activi-*
6 *ty with respect to any records required under*
7 *paragraph (2).*

8 “*(B) NOTICE AND HEARING.—A person sub-*
9 *ject to an examination, audit, or similar activity*
10 *under subparagraph (A) shall be provided notice*
11 *and opportunity for a hearing on the results of*
12 *any examination, audit, or similar activity.*

13 “*(C) AUDIT RESULTS.—After the notice and*
14 *opportunity for a hearing under subparagraph*
15 *(B), the Secretary shall make public the sum-*
16 *mary of any examination, audit, or similar ac-*
17 *tivity under subparagraph (A).*

18 “*(4) RECALL AUTHORITY.—The Secretary shall*
19 *have no authority to recall any food subject to this*
20 *subtitle on the basis of whether the food bears a disclo-*
21 *sure that the food is bioengineered.*

22 **“SEC. 294. SAVINGS PROVISIONS.**

23 “*(a) TRADE.—This subtitle shall be applied in a man-*
24 *ner consistent with United States obligations under inter-*
25 *national agreements.*

1 “(b) OTHER AUTHORITIES.—Nothing in this sub-
2 title—

3 “(1) affects the authority of the Secretary of
4 Health and Human Services or creates any rights or
5 obligations for any person under the Federal Food,
6 Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

7 “(2) affects the authority of the Secretary of the
8 Treasury or creates any rights or obligations for any
9 person under the Federal Alcohol Administration Act
10 (27 U.S.C. 201 et seq.).

11 “(c) OTHER.—A food may not be considered to be ‘not
12 bioengineered’, ‘non-GMO’, or any other similar claim de-
13 scribing the absence of bioengineering in the food solely be-
14 cause the food is not required to bear a disclosure that the
15 food is bioengineered under this subtitle.

16 **“Subtitle F—Labeling of Certain
17 Food”**

18 **“SEC. 295. FEDERAL PREEMPTION.**

19 “(a) DEFINITION OF FOOD.—In this subtitle, the term
20 ‘food’ has the meaning given the term in section 201 of the
21 Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).

22 “(b) FEDERAL PREEMPTION.—No State or a political
23 subdivision of a State may directly or indirectly establish
24 under any authority or continue in effect as to any food
25 or seed in interstate commerce any requirement relating to

1 *the labeling of whether a food (including food served in a*
2 *restaurant or similar establishment) or seed is genetically*
3 *engineered (which shall include such other similar terms as*
4 *determined by the Secretary of Agriculture) or was devel-*
5 *oped or produced using genetic engineering, including any*
6 *requirement for claims that a food or seed is or contains*
7 *an ingredient that was developed or produced using genetic*
8 *engineering.*

9 **“SEC. 296. EXCLUSION FROM FEDERAL PREEMPTION.**

10 *Nothing in this subtitle, subtitle E, or any regulation,*
11 *rule, or requirement promulgated in accordance with this*
12 *subtitle or subtitle E shall be construed to preempt any rem-*
13 *edy created by a State or Federal statutory or common law*
14 *right.”.*

15 **SEC. 2. ORGANICALLY PRODUCED FOOD.**

16 *In the case of a food certified under the national or-*
17 *ganic program established under the Organic Foods Pro-*
18 *duction Act of 1990 (7 U.S.C. 6501 et seq.), the certification*
19 *shall be considered sufficient to make a claim regarding the*
20 *absence of bioengineering in the food, such as “not bioengi-*
21 *neered”, “non-GMO”, or another similar claim.*

Attest:

Secretary.

114TH CONGRESS
2D Session

S. 764

SENATE AMENDMENT TO
HOUSE AMENDMENT
